APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-325-CIV-ATKINS

ALAN B. LEVAN, an individual,

and

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,

Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC.,
a New York Corporation, and
WILLIAM H. WILLSON, an individual,

Defendants.

REPORT AND RECOMMENDATION

This Cause was referred to the undersigned United States Magistrate Judge by the Honorable C. Clyde Atkins, United States District Judge, for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). Pending before this Court are Defendants' *Motion for Entry of Order that Plaintiffs are Public Figures* (D.E. 66) and Defendants' *Motion for Summary Judgment* (D.E. 68).

FACTUAL BACKGROUND

A. "20/20" Investigation

In or around 1991, "20/20," a television news magazine produced and broadcast under the auspices of ABC News, began to pursue a story centering around invest-

ment transactions known as "roll-ups" and specifically one such roll-up managed by Plaintiffs. *Complaint,* (D.E. 1) at 8-9. Plaintiffs allege that William Willson, the producer responsible for this story idea, discussed possible investigations of Plaintiffs with the staff of the U.S. House of Representatives Subcommittee on Energy and Commerce and with several Florida newspapers, in order to generate controversy around Plaintiffs' actions and then cover the resulting investigations. *Id.* at 9-12. While 20/20 continued preparing its story, Plaintiffs cooperated with Willson and participated in several off-the-record discussions while negotiations regarding an on-camera interview proceeded. *Id.* at 14. When Willson decided that the on-camera interview would include questions regarding Levan's prior divorce proceeding, Levan backed out of the interview, although he continued to express a willingness to proceed so long as such personal questions were not included. *Id.* at 15-16. On June 14, 1991, Plaintiffs sent a letter to Willson stating Plaintiffs' belief that the upcoming story would inaccurately portray Plaintiffs' actions. *Id.* at Exhibit B.

B. The Story

On November 29, 1991, Defendants broadcast the story, entitled "Too Good to Be True." *Complaint* at 18.[1] The story discussed the investment technique of real estate limited partnerships, whereby groups of small investors could pool their money to be managed by a general partner in the real estate market. The story discussed the phenomenon of "roll-ups" in which the real estate holdings of such partnerships are exchanged for some other investment, usually bonds. *Answer* (D.E. 12), Ex. A at 7. Plaintiffs' alleged roll-up was the focus of the story.

The introduction of the story contained a voice-over describing the general idea of real-estate investment roll-

[1] A complete transcript of the show is filed with Defendants' *Answer* (D.E. 12) at Exhibit A.

ups, while images of protestors picketing against roll-ups were shown. Then Rosalyn Lamb, an investor with Plaintiffs, was depicted complaining about losing her money. Finally, the voice-over stated that the man behind it all "refused to talk to [ABC]."

The story described how the real estate partnerships managed by Plaintiffs, though initially successful, were hurt by the collapsing real estate market of the mid to late 1980's, leaving the value of the real estate holdings at a fraction of their original worth. Plaintiffs were then said to have offered the limited partners debentures issued by BankAtlantic in exchange for the real estate holdings. Plaintiffs recommended this transaction, according to the story, as a means for the limited partners to cut their losses.

The story reported that since the exchange, Plaintiffs sold a property formally valued at $5 million, for $4 million. Plaintiffs allegedly kept the money, leaving the limited partners with the debentures. The story then reported that the debentures have, since the exchange, lost most of their value. It was reported that although Plaintiffs had made every interest payment to date, the financial condition of BankAtlantic made it unlikely that all payments would be made. The on-air reporter, John Stossel, made the statement, "You've heard of junk bonds? This is perceived as real junk." A Mr. Roy Henry, described in the story as a "Financial Planner," stated that this transaction was "the worst roll-up he had seen."

Several limited partners were shown complaining that their investments have disappeared. One investor stated that the debenture he has is for the amount of $350, whereas his original investment was $2500. Dozens of protestors were portrayed picketing a meeting of general partners, though the voice-over did indicate that these people were involved in another roll-up with no connection to Plaintiffs.

Stossel reported that a majority of limited partners voted in favor of the transaction, on Plaintiffs' recommendation. Representative Matthew Rinaldo was shown criticizing the 360 page prospectus regarding the transaction which was mailed to the limited partners by Plaintiffs. Rosalyn Lamb, an investor, stated that a company was hired by Plaintiffs to encourage the investors to approve the transaction. She stated, "We got phone calls. 'Vote yes. This is the only way to go. If you don't vote yes, you'll lose all your money.' "

Stossel reported that at that time, Levan received a salary of one million dollars a year for managing the partnership. Then, Stossel repeated the assertion that Levan "would not face the cameras." The story indicated that Levan prepared a taped interview depicting him responding to expected questions regarding the transaction. On the program, the tape was used to show Levan responding to a dubbed-in question by John Stossel regarding the conflict of interest involved in being the general partner of the real estate fund and also the President of BankAtlantic.

The story then depicted Levan's appearance before the House Subcommittee on Energy and Commerce. Stossel remarked that this appearance would perhaps yield answers regarding Plaintiffs' actions. Levan was then shown requesting that cameras be turned off in accordance with House rules. After the camera faded out, a scene was depicted in which it appeared that Levan was listening to Representative Thomas Bliley responding to Levan's testimony before the committee. Rep. Bliley stated, "There appears to be only one winner here—Alan Levan. It is clear that the limited partners, the real estate investors, have not benefited nor are they likely to." The story then concluded with general remarks regarding the unfairness of the transaction and the losses of the limited partners.

C. Plaintiffs' Objections

On December 20, 1991, attorney Eugene E. Stearns, on behalf of Plaintiffs, sent a letter to Walter R. Porges, Vice President of News Practices for ABC News, detailing the allegedly false and defamatory statements contained in the story and demanding a retraction. *Complaint* (D.E. 1), at Exhibit D. Stearns indicated that the letter was drafted in accordance with Chapter 770, Florida Statutes. The letter objects to the general characterization of Plaintiffs in the story and chronicles each statement and image and the allegedly false or misleading aspect of each. The letter is attached to the complaint and the objections are therein restated.

PROCEDURAL BACKGROUND

Plaintiffs' Complaint was filed February 7, 1992, challenging the general characterization of Plaintiffs and enumerating the many allegedly false and misleading statements and images. Amongst the specific objections contained in the complaint and attached letter are:

—that the picketers shown in the story were protesting another roll-up having nothing to do with Plaintiffs (*Complaint* (D.E. 1) at 20);

—that all payments owed on the debentures had been made at the time of the story, and that there was no reason to believe that they would stop (*Id.* at 21);

—that Levan was ready and willing to talk with 20/20, and that the on-camera interview was only canceled as a result of Willson's decision to include questions regarding Levan's divorce (*Id.* at 21-22);

—that showing pictures of Levan's expensive home gave the false impression that he got rich by cheating the investors (*Id.* at 24);

—that the property said to have been sold for $4 million had a mortgage on it, leaving the company, not Levan personally, with only five hundred thousand dollars (*Id.* at 33);

—that Roy Henry was biased against Plaintiffs and has stated publicly that he would put Levan out of business (*Id.* at 34);

—that Roy Henry had seen transactions in which investors lost more money, thus this could not be the worst roll-up he had seen (*Id.* at 35);

—that Levan had not spent money to influence the investors' votes (*Id.* at 36).

—that Levan did not avoid giving answers by requesting that cameras not be used at the House hearing, a request fully in keeping with House rules (*Id.* at 39);

—that Rep. Bliley's statements were not made to Levan in response to his testimony, but rather were introductory remarks made before Levan entered the hearing room (*Id.* at 40);

—that 20/20 mischaracterized the statements spoken by Levan on his prepared videotaped "interview" by dubbing in questions different from the ones to which Levan was responding (*Id.* at Ex. D p.14, 32);

In response to the December 20 letter, 20/20 aired an apology, stating that Levan did not keep the $4 million, but that the company received only $500,000, and that Levan was willing to talk with 20/20, but that negotiations had broken down.

The complaint charges that Defendants willfully and with malice aired false and defamatory statements. The complaint also charges Defendants with an invasion of Levan's privacy by placing him in a false light.

Defendants have filed a *Motion for Entry of Order Determining that Plaintiffs are Public Figures* (D.E. 66). In their memorandum of law in support of the motion (D.E. 67), Defendants noted that should Plaintiffs be determined to be public figures, the standard of proof will be raised from having merely to prove negligence by a preponderance of the evidence to having to prove actual malice by clear and convincing evidence. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Defendants maintain that Plaintiffs are limited public figures as defined in *Waldbaum v. Fairchild Publishers, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); and *Silvester v. American Broadcasting Cos.*, 839 F.2d 1491 (11th Cir. 1988) (D.E. 67 at 5). In sum, Defendants argue that the broadcast concerned matters of public controversy, that Plaintiffs were significant and prominent actors in the public controversy, that the allegedly defamatory statements concerned the public controversy, and that Plaintiffs have sought and received wide press coverage of their activities.

Plaintiffs respond to this motion arguing that the determination of whether a party is considered a public figure must wait for the close of evidence unless no genuine issue of material fact exists on the issue. Second, Plaintiffs maintain that they lack sufficient access to the media to counteract the alleged defamation by the 20/20 broadcast. *See Gertz*, 418 U.S. at 344. Third, Plaintiffs assert that they have not been sufficiently involved in the alleged public controversy to be considered public figures. This argument is based on the premise that Defendants have failed to show that there was a public controversy and that Plaintiffs did not participate in any such controversy.

Defendants reply that Plaintiffs have failed to offer any evidence that would indicate a genuine issue of material

fact. Finally, Defendants argue that the test in *Silvester v. American Broadcast Cos.*, 839 F.2d 1491, 1493 (11th Cir. 1988) controls this issue.

Defendants have also filed a *Motion for Summary Judgment* (D.E. 68). In their accompanying memorandum of law, Defendants argue that under both Florida law and federal Constitutional law Plaintiffs must be able to prove that the gist of the story was false. Defendants maintain that Plaintiffs cannot meet this burden because of the verdict in the consolidated *Purcell* litigation (89-1284-CV-RYSKAMP, 89-1605-CV-RYSKAMP, and 89-1850-CV-RYSKAMP) [*Purcell*], in which a jury found that the transaction discussed in the 20/20 story was unfair and that Plaintiffs knew this when they recommended it.[2] In light of this verdict, Defendants maintain that Plaintiffs are precluded from arguing that the gist of the story was untrue. Second, Defendants argue that under Florida law a libel action cannot be maintained if the overall effect of a broadcast would be relatively the same after eliminating the allegedly false statements.

Plaintiffs respond that the gist of the story was not simply that the transaction was unfair, but that Levan made his fortune by cheating small investors and then avoided talking to ABC. Further, Plaintiffs assert that it is the jury, as trier of fact, which must determine what the gist of the story was. Additionally, Plaintiff's maintain that the *Purcell* decision does not apply to this case, since that verdict did not find that the many specific allegedly false statements were true (e.g., that Levan wouldn't talk to 20/20).

ANALYSIS

A. The Public Figure Motion

As a primary matter, in this case the facts are sufficiently clear to allow the court to make a determination

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[2] The *Purcell* case is more fully discussed below.

as to Plaintiffs' status as public figures. In addressing this issue, the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Fifth Circuit in *Rebozo v. Washington Post Co.*, 637 F.2d 375 (5th Cir. 1981), and the Eleventh Circuit in *Silvester v. American Broadcasting Co.*, 839 F.2d 1491 (11th Cir. 1981), have all concluded that the court, rather than the jury, may determine whether an individual is a public figure. In *Silvester*, the district court stated that a public figure determination should be made as a matter of law "if no genuine issue of material fact exists, viewing the evidence in the light most favorable to the [opposing party. . . .]" *Silvester*, 650 F.Supp. 766, 772 (S.D. Fla. 1986).

Under the Supreme Court's analysis in *Gertz*, 418 U.S. 323 (1974), there are two methods for determining whether one is a public figure. *See also, Rebozo*, 637 F.2d 375, 378 (5th Cir. 1981). First, the court must decide whether the party "enjoy[s] significantly greater access to the channels of effective communication and hence [has] a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Gertz*, 418 U.S. at 344. Alternatively, the court may look to see whether the party has "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. This latter method applies to "limited public figures." *See Silvester*, 839 F.2d at 1494. A limited public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 351. It is as limited public figures that Defendants ask the Court to classify Plaintiffs.

To make such a determination, the court must "(1) isolate the public controversy, (2) examine the Plaintiffs' involvement in the controversy, and (3) determine whether 'the alleged defamation [was] germane to the Plaintiffs' participation in the controversy.'" *Silvester*,

839 F.2d at 1494, citing *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980), *cert. denied*, 101 S.Ct. 266.

In determining whether a public controversy existed, a court should ask:

> whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy.

Id. at 1297. On this point, Defendants have offered voluminous uncontested evidence. As to the subject of roll-ups in general, Defendants produced extensive evidence of discussion in Congress and the national media (D.E. 66, Exhibit A [Buckley Affidavit], Exhibits 2, 3, 4, 5, 6, 7). Examples of media discussion include an article in the *San Francisco Examiner* dated July 5, 1987, an article in *Barron's* dated September 4, 1989, and an article in the *Wall Street Journal* dated February 28, 1990. The Congressional hearings cited include hearings held on October 3, 1990, February 27, 1991, and March 21, 1991. Therefore, the subject of roll-ups was a public controversy before the airing of the disputed story.

As to Plaintiffs' involvement in the controversy, Defendants' have again offered great quantities of evidence. The evidence indicates that Plaintiffs' roll-ups were mentioned in the ongoing Congressional hearings (Buckley Affidavit, Ex. 5 at 56, Ex. 7 at 42) and were specifically addressed in Congressional hearings held on July 10, 1991 (Buckley Affidavit, Ex. 6). The evidence further shows that other administrative agencies, such as the SEC and Office of Thrift Supervision were also interested in Plaintiffs' roll-ups prior to the story (*Id.* at 66-98, 102-109).

Plaintiffs' activities were widely reported in local and national publications, such as, *inter alia*, the *Miami Herald* on March 31, 1989, the *Raleigh News and Observer* on January 3, 1990, *Stanger's Investment Advisor* in June, 1990, *Investment Watch News* in September, 1990, and the *San Francisco Chronicle* on October 3, 1990. Articles were specifically focussed on Plaintiffs' financial strength and wisdom (Buckley Affidavit, Exs. 10, 11). What is particularly impressive about all of this evidence is not its volume, though it is substantial. Rather, it is the depth and diversity of evidence that is telling. It is clear that roll-ups were a widely discussed public controversy and that Plaintiffs were widely identified as participants in that controversy, which was the focus of the story.

In addition to Plaintiffs involvement in this particular controversy, the evidence indicates that Plaintiffs have, over the years, sought and received significant attention in the media. Plaintiffs have marketed themselves extensively on a national scale. Defendants have offered evidence of a coordinated effort by Plaintiffs to advertise and promote themselves as respectable national investment managers (Buckley Affidavit, Exs. 12-17, 20-21), employing national representatives in order to gain nationwide prominence (Buckley Affidavit, Ex. 18). In prior years, Plaintiffs have sought and received wide media attention concerning the original acquisition of BankAtlantic (Buckley Affidavit Exs. 29-33). National publications such as *American Banker*, the *Wall Street Journal*, *Business Week*, and the *BNA Banking Report*, as well as local papers, have covered Plaintiffs' activities for years (*Id.*). Plaintiffs are no strangers to national exposure. In *Long v. Cooper*, 848 F.2d 1202, 1205 (11th Cir. 1988), the Eleventh Circuit ruled that vigorous publicity to educate the community and to influence policies of the public and other firms could be sufficient activity to be declared a limited public figure. *See also Waldbaum*, 627 F.2d at 1299.

Whether considered under *Long*, *Silvester*, or *Gertz*, Plaintiffs are public figures. A public controversy surrounding roll-ups existed, Plaintiffs thrust themselves (or were drawn) into the controversy, and they have solicited the interest of the media for many years. Therefore, as a matter of law, they have access to significant communication and have "thrust themselves to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved . . . [and] they [have] invite[d] attention and comment." *Gertz*, 418 U.S. at 345. The evidence supporting this conclusion is overwhelming.

B. The Summary Judgment Motion

The issue underlying this motion is whether or not Plaintiffs can prove that the gist of the 20/20 story is false and defamatory, in light of the *Purcell* ruling.

Both Florida law and federal Constitutional law require that plaintiffs in a libel action prove that the overall substance of the entire offending publication is false. Florida courts have ruled that "[t]he significance lies . . . not within the import of any particular word or words used in a publication but within the over all [sic] effect of the language." *O'Neal v. Tribune Co.*, 176 So.2d 535, 548 (Fla. Dist. Ct. App. 1965). Further, "a publication must be considered in its totality. 'The court must consider all the words used, not merely a particular phrase or sentence.'" *Byrd v. Hustler Magazine, Inc.*, 433 So. 2d 593, 595 (Fla. Dist. Ct. App. 1983) (citing *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 789 (9th Cir. 1980)).

Federal law also limits a libel action to an attack on the gist of the publication. The Supreme Court has ruled that the common law of libel overlooks minor inaccuracies and concentrates on substantial truth. *Masson v. New Yorker Magazine, Inc.*, —— U.S. ——, 111 S.Ct. 2419 (1991). "Minor inaccuracies do not amount to

falsity so long as 'the substance, the gist, the sting of the libelous charge be justified.'" *Id.* at 2433. Further, a statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *Id.* (citation omitted).

First Amendment considerations require some leeway for the press to discuss controversial matters without a chilling fear of being required to prove the truth of all injurious statements. *Jones v. American Broadcasting Cos.*, 694 F.Supp. 1542, 1550 (M.D. Fla. 1988). "To be true 'it is not essential that the literal truth be established in every detail as long as the article contains the gist of the truth as ordinarily understood.' *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1112 (6th Cir. 1978)." *Jones*, 694 F.Supp. at 1550. In short, "the law requires only that the publication be substantially true." *Nelson v. Associated Press, Inc.*, 667 F.Supp. 1468, 1477 (S.D. Fla. 1987).

Plaintiffs argue that it is not for the court to say what the gist of the story was. It is their contention that such a determination must be left for the jury, unless the issue is so unambiguous that the court is able to make that determination as a matter of law. Contrary to this assertion, however, courts have not been so reluctant to make such determinations. *See Bressler v. Fortune Magazine, Div. of Time*, 971 F.2d 1226 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 1416 (1993) (the court summarizes seven paragraphs of an article in one sentence); and *O'Neal*, 176 So.2d at 548 (the court summarizes two newspaper articles in a short statement).

Even the cases cited by Plaintiffs indicate that a court is capable of deciding what the gist of a story is. In *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1073 (5th Cir. 1987), the court affirmed a district court's refusal to grant summary judgment because a jury could believe that the "sting" of a felony accusation was worse

than the "sting" of the malfeasance which was the true circumstance. In *Prins v. International Tel. and Tel. Corp.*, 757 F.Supp. 87, 92 (D. D.C. 1991), the court refused to say as a matter of law that the published statement would have no worse effect than the actual truth. Neither of these cases stand for the proposition that a court ought not decide the gist of a story as a matter of law in circumstances in which a jury could not say that the "sting" of the published story was worse than the actual truth.

In this case, the gist of the story is sufficiently clear and unambiguous for the court to make that determination as a matter of law. After carefully reviewing the transcripts and, more importantly a videotape of the broadcast itself, the gist of the story can be stated as a report on roll-ups in general, Plaintiffs' roll-up in particular, and the unfairness of this particular transaction to the limited partners. It is this summary that Plaintiffs must show is false.

Simplifying matters in this case is the verdict in the *Purcell* litigation. That case was a class action brought by a group of limited partners who had voted against the roll-up. Plaintiffs in the *Purcell* case charged the present Plaintiffs with securities fraud under Section 12(2) of the Securities Act of 1933, Section 10(b) of the Securities Act of 1933, and Section 14(a) of the Securities Act of 1934. Defendants' *Motion for Summary Judgment* (D.E. 68, Ex. 2 at 7-8). The verdict form that was given to the jury contained five questions. Question 1 asked:

> Have the plaintiffs proved, by the greater weight of the evidence, that the Exchange Transaction proposed by BankAtlantic Financial Corporation was "unfair" to the limited partners of I.R.E. Series 21, I.R.E. Series 23 and I.R.E. Series 24?

Id. at 18. The jury answered, "Yes." Question 2 asked:

> Have the plaintiffs proved by the greater weight of the evidence, that the managing general partners, or

> the company or Alan Levan falsely stated in the Prospectus and the transmittal letter that they believed that the Exchange transaction was "fair" when they knowingly believed otherwise?

Id. The jury answered, "Yes." *Purcell,* in short, held that the transaction was unfair to the limited partners, that the present Plaintiffs knew it was unfair, but that the present Plaintiffs falsely recommended the transaction to the limited partners as fair.

The doctrine of issue preclusion renders the prior determination in *Purcell* binding in subsequent actions involving the same issues. That the parties to the present action are not identical to the parties in the *Purcell* litigation does not affect the res judicata analysis. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979) (recognizing nonmutual issue preclusion).[3] In the Eleventh Circuit, the following criteria apply when evaluating issue preclusion:

> (1) the issue at stake [in the second litigation] must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action. . . . In addition, the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.

Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985) (citations omitted). The question in the instant case, that is, whether the transaction was fair, is clearly identical to the question decided

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[3] In a federal diversity action, examining the preclusive effect of a prior federal action, the federal common law of issue preclusion applies. *Precision Air Parts, Inc. v. Avco Corp.,* 736 F.2d 1499 (11th Cir. 1984), *cert. denied,* 469 U.S. 1191 (1985).

by *Purcell*. Further, that question was fully litigated in the prior action and was the focus of the verdict as reflected in the special interrogatories. Finally, the present Plaintiffs had every incentive and opportunity to address that question in the prior action. Therefore, under the doctrine of issue preclusion, the undersigned must accept as true the statement that the transactions spoken of in the 20/20 story were unfair to the limited partners, that Plaintiffs knew that they were unfair, and that despite this knowledge, Plaintiffs counseled the limited partners otherwise.

Given the preclusive effect of *Purcell*, Plaintiffs will be unable to prove that the gist of the 20/20 story is false. The story stated that the transaction was unfair to the limited partners, but that Plaintiffs, who knew better, endorsed it anyway. *Purcell* found that this was exactly what happened. Therefore, for the purposes of this litigation, the story is substantially true. Accordingly, because Plaintiffs will be unable to prove that the story is false, summary judgment must be granted in favor of Defendants.

Though it has been determined that the story is substantially true according to principles of libel law and First Amendment considerations, the undersigned wishes the parties to be aware of the care with which the story was examined. It is clear that 20/20 took license with presenting the facts. Many of the individual statements in the story were misleading, if not completely false. It is worth repeating some of the more egregious examples. Levan was ready and willing to talk with 20/20, and only refrained from consenting to an on-camera interview when 20/20 producer Willson added personal questions regarding Levan's divorce to the list of possible questions. Reporting otherwise was clearly intended to taint Levan's credibility with the viewing public, who would not be privy to the off-camera negotiations that led up to Levan's decision not to appear.

Dubbing in a different question and taking statements out of context from the videotaped interview supplied by Levan were irresponsible and misleading actions. These tactics allowed 20/20 to use Levan's own words to produce false or misleading impressions.

The use of images of people picketing a meeting of general partners was completely misleading, as those general partners had nothing to do with Plaintiffs' transactions. Though 20/20 did include a brief disclaimer regarding these protesters, the juxtaposition of the images with the ongoing story almost certainly worked to associate Plaintiffs with the unhappy people pictured.

Finally, and perhaps most reprehensibly, Defendants' editing allowed them to portray the remarks of Rep. Bliley as being uttered directly to Levan in response to his testimony, when in fact Rep. Bliley's statements were made before Levan appeared and testified. This crafty piece of editing was unfair not only to Levan, but to Rep. Bliley as well.

These examples indicate that the practices of 20/20 in producing this story were shamefully irresponsible. The undersigned is left with the impression that ABC cared more about telling a good story than an accurate one. While the piece as a whole may have been true in the strict legal sense, ethical journalism it was not.

In this country the media are given wide latitude to report the news as they see fit. Democracy depends on a free and independent press. Nevertheless, it is the responsibility of the media to take care in reporting the news. They must not decide that any and all means are justified to get at the truth, for if the press disregards the truth of the details, how can the public trust the truth of the substance? In any event, one can only hope that the practices disclosed in this litigation are not typical of Defendants' present news reporting practices.

RECOMMENDATION

Based on the foregoing, it is hereby RECOMMENDED that Defendants' *Motion for Entry of Order that Plaintiffs are Public Figures* (D.E. 66) be GRANTED and that Defendants' *Motion for Summary Judgment* (D.E. 68) be GRANTED.

Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), the parties may serve and file written objections with the Honorable C. Clyde Atkins, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation. See *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982).

RESPECTFULLY RECOMMENDED, in Chambers, at Miami, Florida, this 22 day of July, 1993.

/s/ William C. Turnoff
WILLIAM C. TURNOFF
United States Magistrate Judge

cc: Honorable C. Clyde Atkins
Raymond V. Miller, Esq.
Alan H. Fein, Esq.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORP.,
a Florida Corporation,
Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC.,
a New York Corporation and
WILLIAM H. WILLSON, an individual,
Defendants.

REPORT AND RECOMMENDATION

This Cause was refered to the undersigned United States Magistrate Judge by the Honorable C. Clyde Atkins, United States District Judge, for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). Presently pending before the undersigned is Defendants' *Motion for Summary Judgment* (D.E. 68).

FACTUAL AND PROCEDURAL HISTORY

This defamation action was brought nearly three years ago by Plaintiffs BankAtlantic Financial Corporation ("BFC") and its President and Chief Executive Officer, Alan B. Levan. Plaintiffs' complaint alleges that a news report aired on the ABC News television program "20/20" was libelous and false. This broadcast reported on the controversy surrounding financial transactions known

as "roll-ups" and specifically featured certain roll-ups promoted and executed by Plaintiffs.

In February 1993, Defendants Capital Cities/ABC and William H. Willson moved for summary judgment. Defendants contended that dismissal was appropriate because Plaintiffs had failed to show that the overall gist of the broadcast was false, a threshold requirement in a defamation action.

On July 22, 1993, the undersigned issued a Report and Recommendation concerning the motion for summary judgment. (D.E. 203). The Report analyzed in detail the ABC broadcast at issue. That Report concluded that the "gist" of the broadcast was that the roll-up transactions promoted by Plaintiffs "were unfair to the limited partners, that Plaintiffs knew that they were unfair, and despite this knowledge, Plaintiffs counseled the limited partners otherwise." *Report and Recommendation* (D.E. 203) at 18. The undersigned found that the issue of whether the roll-ups were knowingly unfair had been previously determined in a prior action styled *Purcell v. Bank Atlantic Financial Corporation*, No. 89-1284-CIV-Ryskamp).[1] Based on this prior judgment, the undersigned recommended dismissing this action since the prior judgment conclusively established that the "gist" of the broadcast (that the roll-ups were knowingly unfair to the limited partners) was substantially true. Accordingly, the undersigned concluded that Plaintiffs were precluded from collaterally relitigating whether the roll-ups were unfair in this subsequent defamation action and thus recommended summary judgment.

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[1] In *Purcell*, Plaintiffs Alan Levan and BFC were found liable for securities fraud. The *Purcell* jury found that certain "roll-up" transactions which Levan and BFC had proposed to their limited partners were unfair and that Plaintiffs knew this when they recommended them. The *Purcell* case is discussed in detail in the July 22, 1993, Report and Recommendation (D.E. 203) at 16-18).

Subsequent to the issuance of that Report, several events have occurred that require the undersigned to reconsider its recommendation. First, in July 1993, Plaintiffs appealed the *Purcell* judgment to the Eleventh Circuit Court of Appeals. In February 1994, the Eleventh Circuit dismissed the *Purcell* appeal due to the lack of finality of judgment. Recognizing that this dismissal might have serious implications in this action, on March 21, 1994, District Judge C. Clyde Atkins issued an Omnibus Order in which he deferred ruling on the Report and Recommendation pending the outcome in *Purcell*. *Omnibus Order* (D.E. 264) at 2.

On April 1, 1994, Plaintiffs filed a status report advising the Court that the parties in *Purcell* had agreed to settle the case and had agreed in principal that the settlement would include a vacatur of the *Purcell* judgment. Consequently, on June 6, 1994, Judge Atkins entered an Order addressing the uncertainty surrounding the finality of the *Purcell* judgment. (D.E. 267). Noting that the judgment in *Purcell* "may no longer be final," Judge Atkins rejected that portion of the Report recommending summary judgment and referred the matter back to the undersigned for further consideration in light of the circumstances in *Purcell*. *Order on Report and Recommendation* (D.E. 267).

On September 12, 1994, the *Purcell* court entered a new Final Judgment which vacated its prior judgment and verdict. The new final judgment made the following findings:

> 1. As previously observed by this Court, in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs.
>
> . . . .
>
> 3. The court was also concerned that a jury might make a decision in this case not on legal principles but on their own judgment of whether they thought

> the proposal was fair, regardless of the merit of the claim. . . . In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.
>
> 5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

Based on these findings, the court ruled as follows:

> 4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

Final Judgment Approving Settlement and Order of Dismissal, (D.E. 282) Exhibit C. This vacatur calls into question the preclusive effect of the original *Purcell* judgment. Thus, the undersigned must reexamine whether there still exist grounds for granting summary judgment. Oral argument on this issue was heard on February 8, 1995.

ANALYSIS

To begin, the undersigned notes that despite the language in the *Purcell* final judgment order stating otherwise, the determination of whether the *Purcell* verdict and judgment preclude this action rests with this Court alone. Case law dictates that courts do not have the power to decide the preclusive effect of their judgments in future litigation. The preclusive impact of a prior judgment is solely the province of the court in which the preclusion is being urged. *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 223 (1985); *Pettibone Corp. v. Easley*, 935 F.2d 120, 123 (7th Cir. 1991). Thus, the first task for the undersigned is to determine whether the vacated *Purcell* judgment has any preclusive effect in the instant case.

As indicated *supra*, the undersigned had previously found that the *Purcell* judgment did preclude further action in the instant case. Shortly after making this recommendation, the *Purcell* judgment on which the finding was based was vacated. Thus, the vacatur of the *Purcell* judgment no longer provides the undersigned with a certain judgment in which to ground collateral estoppel. Nonetheless, Defendants contend that the *Purcell* verdict and judgment are sufficiently final to support the application of collateral estoppel. A careful review of Defendants' position shows that their argument is unavailing.

Defendants admit that as a general matter if a judgment is vacated, the judgment will not be given preclusive effect. *See United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1561-62 (11th Cir. 1992) (holding that vacatur divests the lower court's earlier judgment of its binding effect); *No East-West Hwy. Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) ("A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel."); *Wolcott v. Ginsburg*, 697 F. Supp. 540, 543 (D.D.C. 1988) ("As a general matter a judgment which is vacated, for whatever reason, is de-

prived of its collateral effect, both as collateral estoppel and res judicata."). However, Defendants contend that the same result is not warranted in a situation where as here, a judgment has been vacated at the request of two private parties because they have settled after the entry of judgment.

Defendants cite several cases recognizing that judgments that are not final for all purposes may be sufficient for purposes of collateral estoppel so long as the issue in question was fully and fairly litigated and the decision that resulted was not tentative. *See e.g. John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990) *cert. denied*, 500 U.S. 905 (1991) (defendants were collaterally estopped from relitigating issues determined by jury's verdict on liability even though the damages phase of the prior litigation was not concluded); *Alexander v. Chicago Park District*, 773 F.2d 850, 854 (7th Cir. 1985) *cert. denied*, 475 U.S. 1095 (1986); *O'Reilly v. Malon*, 747 F.2d 820, 823 (1st Cir. 1984); *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1190-92 (5th Cir. 1982) *vacated and remanded on other grounds*, 460 U.S. 1013 (1983), *initial opinion adhered to on remand*, 718 F.2d 725 (5th Cir.), *cert. denied*, 460 U.S. 1013 (1983); *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961) (holding that "finality" in the context of collateral estoppel may mean little more than that the litigation of a particular issue has reached a stage that a court sees no good reason for permitting it to be relitigated). However, none of the cases Defendants cite address the situation here, where the court has vacated its prior judgment. Defendants fail to cite one case from this Circuit in which a vacated judgment has been given a preclusive effect.

Given the lack of case law on point, Defendants ask for equitable relief. Defendants contend that Plaintiffs' settlement of *Purcell* was little more than an attempt to buy off the estoppel effect of the *Purcell* judgment and verdict.

Defendants argue that such manipulation of the judicial system warrants this court using its equitable powers to overlook the vacatur of the *Purcell* judgment. Indeed, several courts have expressed their concern with the possible injury done to the court's integrity in situations where deep-pocketed litigants offer lucrative settlement terms in return for a joint motion to vacate. *See e.g., Federal Deposit Insurance Corp. v. Mintz,* No. 92-6679-CIV-GONZALEZ (S.D. Fla. July 26, 1984); *In re United States,* 927 F.2d 626, 627 (D.C. Cir. 1991); *Clarendon Ltd. v. Nu-West Industries, Inc.,* 936 F.2d 127 (3d Cir. 1991); *In re Memorial Hospital of Iowa County, Inc.,* 862 F.2d 1299 (7th Cir. 1988); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters,* 686 F.2d 720, 722 (9th Cir. 1982). Defendants specifically point to the United States Supreme Court's recent decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* —— U.S. ——, 115 S.Ct. 386 (1994) as support for their contention.

In *U.S. Bancorp,* the Supreme Court addressed the question of whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after an appeal is filed. The Court expressed its disfavor for such practices and held that judgments should be vacated only in exceptional circumstances and that "mootness by reason of settlement does not justify vacatur of a judgment under review". *Id.* at 393. Writing for a unanimous court, Justice Scalia explained that vacatur is an equitable remedy and as such must take into account the public interest. Scalia elaborated that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* at 392 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.,* —— U.S. ——, 114 S.Ct. 425 (1993) (STEVENS, J., dissenting).

While the Supreme Court's decision in *U.S. Bancorp* concerned only whether appellate courts should vacate judgments, lower courts have applied the principles set forth in *U.S. Bancorp* to both deny and grant vacatur at the district level. *See Espirito Santo Bank of Florida v. Kyriakides*, Nos. 89-16506-BKC-AJC, 90-0415, 1995 WL 75911 (Bankr. S.D. Fla. Feb. 6, 1995) (finding that "while the matter before this Court did not involve a judgment under review by an appellate court which has become moot, the principles and policies discussed in *U.S. Bancorp* regarding the treatment of motions to vacate judgments were applicable there); *Alexander v. Perrill*, 872 F. Supp. 722 (D. Ariz. 1995) (applying the standards set forth in *U.S. Bancorp* to find that vacatur was appropriate and consistent with Supreme Court precedent). Defendants argue that this precedent combined with the "realities of the *Purcell* litigation" lead to the conclusion that the prior decision in *Purcell* should prevent this Court from relitigating the question of whether the roll-ups were knowingly unfair. However, no courts have stretched the reasoning in *U.S. Bancorp* to the lengths to which Defendants now contend is appropriate. Defendants' contention that the undersigned may somehow look past the vacatur in *Purcell* is not supported by legal precedent nor does it take into account the practical result of such blind neglect.

The practical effect of Defendants' contention would have this Court make a preliminary finding that the *Purcell* court's decision to grant vacatur was unjustified, effectively overruling that court's decision. Neither the decision in *U.S. Bancorp*, nor other cited precedent, grants this Court such license. The factors enumerated by the Supreme Court in *U.S. Bancorp* were for the benefit of appellate (and by implication trial) courts to consider when determining whether *granting* vacatur in certain circumstances is proper. *U.S. Bancorp* does not begin to address what effect a judgment may have once vacated. Indeed, nothing in *U.S. Bancorp* or the other

cases upon which Defendants rely gives a second district court the authority to determine that another trial court's decision to vacate was improvidently granted, thus allowing the second court to accept whichever judgment it believes to be the most equitable. Nor does the undersigned find that the facts of this case warrant such a leap in reasoning.

In the instant case, the presiding judge in *Purcell* considered the actions that occurred at trial and the surrounding circumstances and decided that vacatur of that action was proper. Although the trial judge in *Purcell* did not have the benefit of the reasoning of *Bancorp* to aid in his determination, it is not within the province of this Court to second-guess his decision to vacate. Thus, the undersigned must give the *Purcell* vacatur its full impact.

Although two other circuits have held that in limited circumstances a vacated judgment still may have a preclusive effect, *see Bates v. Union Oil Co.*, 944 F.2d 647, 649-50 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1761 (1992); *Chemetron Corp.*, 682 F.2d at 1190-92; *see also Aetna Casualty and Surety Co. v. Jepperson*, 440 F.2d 394, 199-400, 403-05 (D. Nev. 1977), the Eleventh Circuit has held that a vacated judgment, even if due to settlement, has no precedential effect. *Delta Air Lines Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582 (11th Cir. 1983). The undersigned does not find the facts in this case distinguishable from *Delta*.

Based on the foregoing, the undersigned finds that the vacated judgment in *Purcell* has no preclusive effect. Nothing determined in the *Purcell* action can prevent further litigation by the parties in this action. Although the Court must be ever vigilant in protecting itself from manipulation by deep-pocketed litigants who use their means to strategically avoid the effects of unfavorable rulings, the decision on whether to vacate a judgment ultimately rests with the presiding trial judge. Review of a

trial court's decision to vacate falls solely within the jurisdictional province of the appellate court. Not even the broadest principles of equity allow a second trial court to assume appellate jurisdiction and "look past" a vacated judgment in order to choose a verdict that it believes to be more just.

Moreover, the record in *Purcell* indicates that the vacatur was based on more than a wealthy litigant's buy out of an unfavorable judgment. Rather, the *Purcell* final judgment included specific findings in which the court expressed its belief that the judgment had weak underpinnings, was likely to be overturned on appeal, and noted the possibility of jury bias. These findings were consistent with the court's commentary made throughout the trial.[2] Thus, the undersigned believes that vacatur was proper even under the reasoning set forth in *U.S. Bancorp.*

Based on the foregoing, the vacated judgment in Purcell is insufficient to preclude the litigation of any of the issues in the instant case. To hold otherwise would prevent a trial on the merits of this action based on a judgment in a separate action which neither the parties to the prior

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[2] Defendants put great emphasis on the fact that the final judgment was drafted by Levan and BFC's counsel. Defendants state that "the judgment was signed in haec verba at the *Purcell* settlement hearing by the presiding judge who denied without comment or opinion ABC's motion to intervene to protest the vacatur, who didn't ask to hear ABC's objections to the consent judgment until after it was signed, who did not in any oral or written statement indicate that the interest of the public as a whole (let alone ABC) in the preservation of the original judgment had been taken into account." (D.E. 297). At best, Defendants imply that the presiding judge did not take into account several factors that case law suggests he should have before entering the vacatur. At its worst, Defendants argument implies that the presiding judge simply "rubber stamped" the consent judgment without proper consideration. While the undersigned acknowledges that the degree of scrutiny a consent judgment may receive often varies, the record here shows that the *Purcell* consent decree received careful scrutiny.

litigation, nor the trial judge, believes is valid. Accordingly, Defendants' motion for summary judgment based on collateral estoppel grounds should be denied.

Different Effects Test

The Court's inquiry does not end here, because Defendants assert a second basis for granting summary judgment that was not addressed in the previous Report and Recommendation. Defendants assert that under what has become known as the "different effects" test, Plaintiffs have failed to show libel.

The "different effects" test was explained in the seminal case of *McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197 (Fla. 2d DCA 1962). In *McCormick* the court set fourth the general principles used to govern its analysis:

> It has been held that newspapers are not to be held to the exact facts or to the most minute details of the transactions they publish, that what the law requires is that the publication shall be substantially true, and that the mere inaccuracies, not affecting materially the purport of the article, are immaterial . . . A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Id. at 200 (citations omitted). To apply the different effects test the *McCormick* court eliminated from the articles the parts alleged to be false. The court then analyzed the edited articles and concluded that "the articles would not have produced a different effect, as the common mind would naturally understand them, than that which they produced with the alleged false parts included." Accordingly, the court held the articles were not libelous and dismissed the action. Courts since *McCormick* have consistently applied the "different effects" test to determine if an alleged libel was actionable. *See Nelson v. Associated Press*, 667 F. Supp. 1468 (S.D. Fla. 1987); *Hammond*

v. Times Publishing Co., 162 So.2d 681 (Fla. 2d DCA 1964); *Hill v. Lakeland Ledger Publishing Corp.*, 231 So.2d 254 (Fla. 2d DCA 1970); *Bishop v. Wometco Enterprises, Inc.*, 235 So.2d 759 (Fla. 3d DCA 1970).

In the instant case, Plaintiffs' cause of action is sufficient to pass the "different effects" test. Plaintiffs' Complaint takes issue with several of the statements made in Defendants' broadcast. After deleting the challenged portions of the broadcast the viewer is left with a different impression than the original broadcast.

To summarize, the edited broadcast * begins by giving broad prefatory information explaining how in the 70's and 80's big financiers, such as Plaintiffs, marketed real estate investments to smaller investors through the use of limited partnerships. The broadcast tells viewers that the partnerships made money until a downturn in the real estate market reduced their value. The story states that as a result of the downturn, most small investors believed that they would have to sell their real estate at a loss, but were instead offered the alternative of roll-up transactions. The report then describes what happens in a typical roll-up transaction. At this point in the edited broadcast, Plaintiffs are barely mentioned.

The first substantial reference to Plaintiffs occurs in the following portion of the report when the Levan roll-up is used as an example of an investment gone sour. The report specifically points to the Levan transaction and explains that in that roll-up the limited partners were given bonds in exchange for real estate. The edited broadcast states that many investors were given bonds with a face value of less than they invested. The report continues by stating that some of that loss was expected and this loss

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*** In their motion, Defendants' have set forth an "edited" broadcast script which deletes the "challenged" portions of the actual broadcast.**

wasn't Levan's fault, but that the problem with the bonds was that their real value depends on the health of Plaintiffs' savings and loan. The report then states that even though Plaintiffs' bank had made every interest payment thus far, the general belief that the bonds would not be paid off devalued the worth of the bonds to the point that they were considered "junk." Nothing in the broadcast to that point indicates that the transactions were inherently unfair or that Levan had any improper motives in issuing the bonds.

The next part of the report quotes a financial planner who states that the roll-ups were done for the benefit of the general partners only and not for the benefit of the limited partners. The broadcast then explains that Levan could not force the limited partners to accept the roll-up, rather the transaction had to be approved by a majority vote of the limited partners. The broadcast then explains that the root of the problem with many roll-ups, including Plaintiffs', may well be that the prospectuses are no longer understandable to the average investor and that Congress is looking into that very problem.

The abridged broadcast then airs comments made by Alan Levan in which he states that the limited partners' vote in favor of the roll up was the right decision and that in 20 years he has never failed to meet a contract obligation.

The broadcast concludes with the statement that Alan Levan's roll-up is just one of many where the general partner seemingly has done better than the limited partners and how in general small investors get burned when they invest in something they do not understand.

After deleting the contested portions of the broadcast the viewer is left with the conclusion that in general roll-ups have not benefited the smaller investor and that Plaintiffs' roll-up was no exception. The abridged broadcast indicates that the reason for this is that generally these

investors are overwhelmed by the length of prospectuses and the complexity of the transaction. In contrast to the original broadcast, the abridged version does not lead the average viewer to assume that Plaintiffs knowingly tried to dupe the limited partners into accepting an unfair transaction. Thus, the gist of the original published version does not lead the common viewer to the same conclusion as does the abridged version. Accordingly, Plaintiffs' Complaint passes the different effects test and summary judgment should not be granted.

Finally, the undersigned believes that the public interest dictates that the merits of this action be decided by a jury at trial. The First Amendment guarantees the press a right to engage in rasping and controversial discussions on all topics of public interest. However, it does not guarantee a defense against libel. So far, the public has only heard one side of the story, that is, the "20/20" broadcast. Certainly, public interest dictates that both the content of the broadcast and its production deserve scrutiny on the merits. In such cases summary judgment is not appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (holding where there is a reason to believe that the better course would be to proceed to a full trial, summary judgment should be denied).

RECOMMENDATION

Based on the foregoing it is the recommendation of the undersigned that Defendants' *Motion for Summary Judgment* (D.E. 68) be DENIED. Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), the parties may serve and file written objections with the Honorable C. Clyde Atkins, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation. See *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982).

DONE AND ORDERED, in Chambers, at Miami, Florida, this 17 day of April, 1995.

/s/ William C. Turnoff
WILLIAM C. TURNOFF
Chief United States
Magistrate Judge

cc: Honorable C. Clyde Atkins
Alan Fein, Esquire
Floyd Abrams, Esquire